

**BEFORE THE  
RESPIRATORY CARE BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the Statement of Issues Against:

MARCIA ANNE SIERRA  
4617 New Hope Lane  
Salida, CA 95368

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Case No.: 1H 2007 433

OAH No.: 2008030622

**DECISION AND ORDER**

The attached proposed Decision of the Administrative Law Judge is hereby adopted by the Respiratory Care Board of California, Department of Consumer Affairs, as its Decision in the above entitled matter.

This Decision shall become effective on June 16, 2008.

It is so ORDERED June 6, 2008.

Original signed by:

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LARRY L. RENNER, BS, RRT, RCP, RPFT  
PRESIDENT, RESPIRATORY CARE BOARD  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

BEFORE THE  
RESPIRATORY CARE BOARD  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Statement of Issues  
Against:

MARCIA ANNE SIERRA  
Salida, CA 95368

Respondent.

Case No. 1-H 2007 433

OAH No. 2008030622

**PROPOSED DECISION**

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on April 17, 2008, in Sacramento, California.

Catherine E. Santillan, Senior Legal Analyst, represented Stephanie Nunez (complainant), Executive Officer, Respiratory Care Board (Board).

Marcia Anne Sierra (respondent) appeared on her own behalf.

Evidence was received, the record was closed, and the matter was submitted on April 17, 2008.

**FACTUAL FINDINGS**

1. On July 11, 2007, the Board received an application from respondent for a respiratory care practitioner license. Respondent disclosed on her application the convictions described in Findings 2, 3 and 4 below. The Board denied the application on November 20, 2007, based upon these convictions. Respondent requested a hearing on the denial.

2. On January 4, 1996, in the Santa Clara County Municipal Court, respondent, upon her plea of guilty, was convicted of violating Vehicle Code section 23103, subdivision (a), reckless driving, a misdemeanor. Respondent was ordered to pay fines and fees, and to complete a First Offender Alcohol Program.

The incident underlying this conviction occurred on November 3, 1995, when respondent was 25 years old. A California Highway Patrol (CHP) officer stopped respondent after he observed her car weaving on the road. Respondent voluntarily submitted to a breath test. The results of that test revealed that respondent's blood alcohol content was .07/.07 percent.

Respondent paid all court-ordered fines and fees. She successfully completed all components of the First Offender Drinking Driver Program.

3. On April 2, 2001, in the Alameda County Municipal Court, respondent was convicted of violating Vehicle Code section 23152, subdivision (a), driving under the influence of alcohol (DUI) with one prior conviction, a misdemeanor. Respondent was ordered to serve six days in jail, was placed on probation for 60 months, and was ordered to pay fines and fees. She was also ordered to attend and participate in an 18-month treatment program for problem drinking. In addition, her driver's license was restricted for one year.

The incident underlying this conviction occurred on March 3, 2001, when respondent was 30 years old. Respondent was stopped by a CHP officer. She agreed to take a breath test. The results of that test revealed that respondent's blood alcohol content was .13/.11 percent.

Respondent paid all court-ordered fines and fees. She served three days in jail and successfully completed an Alternative to Jail Work Program on May 27, 2001. She also successfully completed the 18-month DUI program on October 30, 2002.

4. On March 14, 2007, in the Stanislaus County Superior Court, respondent, upon her plea of nolo contendere, was convicted of violating Vehicle Code section 23152, subdivision (a), DUI, a misdemeanor. The court placed respondent on probation for 36 months, ordered her to serve 35 days in jail, gave her credit for two days served, and ordered her to pay fines and fees. The court also ordered her to complete a Level II Drinking Drivers Program.

The incident underlying this conviction occurred on December 11, 2006, when respondent was 36 years old. A CHP officer stopped respondent's vehicle. Respondent agreed to take a breath test. The results of that test revealed that respondent's blood alcohol content was .20/.17/.19 percent.

Respondent participated in the Alternative Work Program in lieu of jail time. She worked for the City of Modesto cleaning bathrooms, scrubbing toilets, emptying garbage cans, and doing other work as assigned. Respondent is making payments towards the fines and fees the court ordered her to pay. She is participating in the Level II Drinking Drivers Program. Her probation is scheduled to end in March 2010.

5. Respondent completed a Respiratory Education Program at Maric College in August 2007. On October 31, 2006, Dave Forrest, her Clinical Instructor rated her as either above average or excellent in all performance areas. On July 14, 2007, Fabian Gomez, her Clinical Instructor, rated her as excellent in all performance areas. She graduated from Maric with a 3.44 cumulative GPA. In June 2007, she successfully completed a Comprehensive Respiratory Care Seminar conducted by Kettering National Seminars. Thom Ankeney, Maric's RT Program Director, submitted a letter dated March 25, 2008, in which he described respondent as "eager to learn," "warm," "sensitive," and "caring." He believes that respondent would make a "wonderful Respiratory Therapist."

6. For the past two years, respondent has worked as a general office clerk for Nor Cal Appraisers. Her boss is Gary Lev. Since October 2007, she has been babysitting for Mr. Lev's newborn son. Mr. Lev submitted a letter of recommendation dated April 15, 2008, in which he complimented respondent's "giving, gentle, and generous nature."

7. From 1998 to December 2005, respondent worked as a Sales Administrator for Wyse Technology. She submitted copies of the performance evaluations she received while employed at Wyse. Those evaluations indicate that respondent was generally rated as performing at the "above expectations" level. Curt Drzewiecki, a Manufacturing/Quality Engineer at Wyse, submitted a letter of recommendation dated April 14, 2008. In his letter, Mr. Drzewiecki described respondent's "attention to detail and follow up" as "outstanding." He stated that she had "demonstrated extreme patience, empathy and compassion for those individuals who are difficult and sometimes unreasonable."

8. Debra Jacques, respondent's sister and an R.N., testified that she encouraged respondent to pursue a respiratory care practitioner license because respondent is a caring, patient, and loving individual who works well with the public. Ms. Jacques believes that respondent has reformed and should be granted a license.

9. Respondent enrolled in the Level II DUI Program at Occupational Health Services on March 19, 2007. As of April 1, 2008, she had completed six substance abuse education classes, 35 group sessions, and 26 individual counseling sessions. In respondent's DUI Program Progress Report, Pat Gonzales, Supervisor, stated that respondent had "shown positive progress" and a "high level of participation in all activities assigned." Respondent was "cooperative and compliant in all areas of the program." Respondent still has to complete the re-entry phase of the program. Her estimated completion date is September 24, 2008.

10. At hearing, other than disputing some of the facts in one of the CHP arrest reports, respondent admitted her wrongdoing and took responsibility for her convictions. Notwithstanding her three convictions, respondent asserted that she did not have a drinking problem. She stated that she stopped drinking after her arrest on December 11, 2006, and has had only a glass of wine on Christmas since then. Because she does not think that she

has a drinking problem, and believes that she is able to stop drinking on her own, she has not participated in Alcoholics Anonymous or any similar programs, other than those ordered by the court.

11. Respondent's testimony at hearing was forthright and candid. Her academic performance in Maric's Respiratory Education Program was praiseworthy. Her work history and evaluations were commendable. Respondent, however, has had three alcohol-related convictions in 11 years. As ordered by the court, she completed two DUI programs. She did not, however, stop drinking and driving after completing those programs. She has not yet completed her current Level II DUI program. She is scheduled to remain on probation until March 2010. While respondent asserted that she stopped drinking after her third arrest, given her history of alcohol-related crimes, a longer period of sobriety and law-abiding behavior is necessary to provide adequate assurances that respondent would not pose a threat to the public if she were licensed. In sum, it would not be in the public interest to grant respondent a respiratory care practitioner license at this time, even on a probationary basis.

12. Pursuant to Business and Professions Code section 3753.5, complainant submitted a Certification of Costs and Declaration of Senior Legal Analyst, which requested costs in the amount of \$1,313.00 for: (1) obtaining, reading and reviewing investigative materials; (2) drafting the Statement of Issues, correspondence, memoranda, and other case-related documents; (3) communicating with respondent, Department of Justice staff, and others concerning the case; and (4) preparing for hearing. Respondent objected that she would not be financially able to pay these costs if she did not receive a license to act as a respiratory care practitioner. Complainant's request for costs is addressed in Legal Conclusion 3, below.

### LEGAL CONCLUSIONS

1. Pursuant to Business and Professions Code section 3750, subdivision (d), the Board may deny a license to an applicant who has been convicted of a crime that "substantially relates to the qualifications, functions, or duties of a respiratory care practitioner." California Code of Regulations, title 16, section 1399.370 sets forth criteria established by the Board for determining whether a crime is substantially related and, in pertinent part, provides:

For the purposes of denial, suspension, or revocation of a license, a crime or act shall be considered to be substantially related to the qualifications, functions or duties of a respiratory care practitioner, if it evidences present or potential unfitness of a licensee to perform the functions authorized by his or her license or in a manner inconsistent with the public health, safety, or welfare. Such crimes or acts include but are not limited to those involving the following:

[¶] ... [¶]

(c) Conviction of a crime involving driving under the influence or reckless driving while under the influence.

Respondent's three alcohol-related convictions indicate an inability or unwillingness to obey the legal prohibitions with respect to alcohol consumption, constitute a breach of a duty owed to society, and reflect a lack of sound judgment that is relevant to an applicant's fitness and competence to act as a respiratory care practitioner. (See *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 770-771; *In re Kelley* (1990) 52 Cal.3d 487, 496.) Pursuant to California Code of Regulations, title 16, section 1399.370, subdivision (c), these convictions are substantially related to the qualifications, functions, and duties of a respiratory care practitioner and establish cause to deny respondent's application under Business and Professions Code section 3750, subdivision (d).<sup>1</sup>

2. Respondent's decision to stop drinking is commendable. Her testimony was candid. She took responsibility for her crimes. It has, however, been barely more than one year since her most recent conviction. She was convicted of three alcohol-related crimes between 1996 and 2007. She has not yet completed her Level II DUI program. She is still on probation for her third conviction. (See *In re Gossage* (2000) 23 Cal.4th 1080, 1099 ["Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a bar applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole."].) While the efforts respondent has made toward becoming a respiratory care practitioner are praiseworthy, given the recency of respondent's latest conviction, a longer period of sobriety and law-abiding behavior is necessary to provide adequate assurances that respondent would not pose a threat to the public if she were licensed. It would not be in the public interest to grant respondent a respiratory care practitioner license at this time, even on a probationary basis.

3. Business and Professions Code section 3753.5, subdivision (a), in relevant part, provides:

In any order issued in resolution of a disciplinary proceeding before the board, the board or the administrative law judge may direct any practitioner or applicant found to have committed a

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<sup>1</sup> Complainant also contended that respondent's application was subject to denial under Business and Professions Code section 3750, subdivision (g) "Conviction of a violation of any of the provisions of this chapter or of any provision of Division 2 (commencing with Section 500), or violating, or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision or term of this chapter or of any provision of Division 2 (commencing with Section 500)." Complainant did not establish that this subdivision applies.

violation or violations of law to pay to the board a sum not to exceed the costs of the investigation and prosecution of the case.

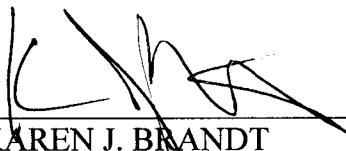
In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth the following factors to be considered when determining the reasonableness of the costs sought pursuant to statutes like Business and Professions Code section 3753.5: whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate in light of the alleged misconduct. Although *Zuckerman* involved a licensee charged with wrongdoing in an accusation, these factors apply in this statement of issues against an applicant.

While respondent was not successful in obtaining a license, it was evident from the information she presented that she had a good faith belief that the efforts she had made toward becoming a respiratory care practitioner, her positive recommendations, and her decision to stop drinking caused her application for a license to be meritorious. Given respondent's subjective good faith belief in the merits of her position, no costs will be awarded against her.

#### ORDER

The application of respondent, Marcia Anne Sierra, for a respiratory care practitioner license is DENIED.

DATED: April 24, 2008

  
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KAREN J. BRANDT  
Administrative Law Judge  
Office of Administrative Hearings